

Imitating Democracy

Alina Cherviatsova

2020-03-12T16:56:25

While the world is dealing with the Coronavirus, Russia is moving fast with its constitutional reform. Nothing can stop it. Everything should be finished in less than two months and approved by the all-Russia's vote on April 22.

These days the question about Putin's (or Russia's?) future after 2024 got a clear answer. On 10 March, the State Duma supported an amendment, which, if it enters into force, will allow Putin to participate in the presidential elections 2024. Although the amendment is constitutionally questionable – substantively as well as procedurally – Russia's Constitutional Court is likely to give its approval.

Russia's Constitution

Before analysing Putin's constitutional initiatives some preliminary remarks should be made regarding the Constitution of the Russian Federation.

The Constitution was adopted by referendum on December 12, 1993, proclaimed by President Yeltsin, and came into force on December 25, 1993. It abolished the Soviet constitution of 1978 as well as the soviet system of government. This constitution is the second-longest valid constitution of Russia after the so-called Stalinist constitution of 1936. Structurally, it consists of a preamble, 9 chapters, and concluding and interim provisions.

Since 1993, the Constitution has been amended several times with some minor changes. The major changes happened in 2008, when the presidential terms and those for the lower house of parliament were extended. Thus, the constitutional initiatives of 2020 are the most significant constitutional reforms in Russia's modern history. In general, these changes are designed to prevent changes and transformation; it is unlikely that they will open a new political era for the Russian Federation.

Constitutional Reform and 2024

Putin's constitutional reform is his answer to the question of 2024: What will happen next?

Russia's Constitution explicitly states that 'one and the same person may not be elected President of the Russian Federation for more than two consecutive terms' (Article 81 (3)). Putin, who rose to the presidency on New Year's Eve 1999 (nominated by Boris Yeltsin's as his successor) and who had served for two four-year terms after the elections in March 2000, had to make a 'chess castling' in 2008 because of this constitutional provision: He moved Medvedev to the presidency for a term and became his prime minister, not giving up any real power. During

Medvedev's presidency the Constitution was changed to extend the presidential term from four to six years to benefit Putin: In 2012, he returned to the Kremlin for a six-year term; in 2018, he was re-elected. Thus, according to Article 81(3), Putin cannot run for presidency in 2024. He would have to step down or change the rules.

There were several options to extend his power beyond the current presidential term. The simplest one would have been to repeat a chess castling and rule the country from the chair of prime minister. The second option would have been to follow President Lukashenko's example, who removed a 'limit of two consecutive terms' from the Belorussian Constitution. However, Putin's strategy is more complicated.

At the beginning of the constitutional reform (January, February) it seemed that Russia's President was ready to leave the presidency and was in search of a model which would allow him to maintain influence. His annual state-of-nation speech on 15 January and the first and second drafts of the constitutional amendments were interpreted as an intention to step down. In particular, the proposals to ensure guarantees to former presidents, the upgrade of the status of the State Council to the level of a constitutional body and the creation of the Security Council (which appeared in the second draft) were signs of this intention. The scenario that Putin would head the newly empowered State Council or the newly established Security Council (like, for instance the former president of Kazakhstan, Nursultan Nazarbayev, did after resigning in March 2019) was real. Now this scenario can be a plan 'B', if a plan 'A' to stay in the presidency after 2024, which was articulated on 10 March, does not work.

No new Putin... Long live Putin!

One of Putin's amendments removes the word 'consecutive' from Article 81 (3) imposing a conclusive two-term limit on future Russian presidents. On the one hand, Putin demonstrates that he does not want his successor, whoever it is, to stay in power for long. In this sense, the amendment to Article 81 means no 'new Putin'. On the other hand, the State Duma gave this amendment a prospective interpretation and created a legal loophole for Putin to stay in power after 2024.

On March 10, Valentina Tereshkova, the State Duma deputy, popular nationally as the first woman in space, voiced a proposal which was not on the paper: "I suggest that we either lift the restriction on the number of presidential terms or indicate in an article of this bill that the incumbent president, just like any other citizen, has the right to run for president after the updated constitution takes effect". This proposal, which deputies met with applause, resets Putin's current two presidential terms to zero. It means that in 2024 he would be able to run once again with a chance to be re-elected in 2030 for the next six years. Long live Putin, till 2036!

Putin, who was invited to the State Duma to express his opinion regarding this proposal, stressed that he would not oppose this change if Russia's Constitutional Court confirms its constitutionality and if the proposal is supported by the majority of the all-Russia vote. He also stressed that since the constitutional reform will

be approved by Russia's citizens, there is no need to have early parliamentary elections.

Making references to the Constitutional Court and the all-Russia's vote Putin aims to create a picture that the constitutional reform follows the constitutional procedures. But is this true?

Constitutional Reform: Procedural Issues

Although the Constitution of the Russian Federation regulates procedures for constitutional changes, the bill on the constitutional amendments is preoccupied with procedural issues. Structurally, it includes three articles: Article 1 lists changes to the Constitution, Articles 2 and 3 are devoted to procedural issues of the constitutional reform, setting up the mechanism of the all-Russia's vote and regulating the role of the Constitutional Court, accordingly. In fact, the Bill foresees a special, *ad hoc*, procedure within which the amendments would come in force. This procedure differs from the procedure specified in Chapter 9 of the Constitution.

What does the Constitution of the Russian Federation say?

Chapter 9 (articles 134-137) of the Constitution envisages two separate procedures for constitutional changes depending on the chapter concerned. The procedure of amendments to Chapters 3-8 is similar to that of the adoption of federal constitutional laws (Article 136): a bill on constitutional amendments should be approved by not less than 3/4 of the total number of the members of the Council of the Federation (the higher house of the parliament) and not less than 2/3 of the total number of the deputies of the State Duma (the lower house of the parliament). Then, the constitutional amendments come into force after they are approved by the legislatures of not less than 2/3 of the subjects of the Russian Federation. Thus, the amendments to these chapters do not need to be approved by referendum.

Changes to Chapter 1 'The Fundamentals of the Constitutional System', Chapter 2 'Rights and Freedoms of Man and Citizen' and Chapter 9 'Constitutional Amendments and Review of the Constitution' foresee a special procedure of the revision of the Constitution as a whole. If changes to these Chapters are supported by 3/5 of the total number of the members of the Council of the Federation and the deputies of the State Duma, the Constitutional Assembly shall be convened. The Assembly can either confirm the invariability of the Constitution or draft a new Constitution. In the last case, a new Constitution can be adopted by 2/3 of the total number of the Assembly or by referendum.

Russia's constitutional reform follows none of these procedures, creating a third way to amend the Constitution.

How will the constitutional reform be implemented?

Articles 2 and 3 of the Bill on the constitutional amendments address the practical questions of the constitutional reform. Its implementation will move through three stages. At the first stage, after parliament adopts a bill on constitutional

amendments, it should be approved by 2/3 of the subjects of the Russian Federation. Then, at the second stage, the Constitutional Court of the Russian Federation should confirm (i) the constitutionality of the amendments in the context of Chapters 1, 2 and 9 and (ii) the constitutionality of the all-Russia vote shall serve as a mechanism of the final approval of the amendments. The decision should be made within 7 days upon the President's request.

If the Constitutional Court rules that the amendments or the procedure of the all-Russia vote are unconstitutional, the amendments will not come in force and the all-Russia vote will not be conducted. Accordingly, if the Constitutional Court confirms the constitutionality of Putin's initiatives, the constitutional reform moves on to the third stage – the all-Russia vote which will be held in accordance with Article 2 of the Bill on the constitutional amendments.

The Constitution of the Russian Federation does not foresee participation of the Constitutional Court and Russia's citizens in the constitutional reform if Chapters 3-8 are concerned. Their involvement in the constitutional process reflects the Kremlin's main fears that the constitutional initiatives could be challenged as illegal or illegitimate. In this sense, the function of the Constitutional Court is to remove all doubts about the constitutionality of the constitutional reform as a whole and each amendment particularly, while the all-Russia's vote is called to demonstrate people's loyalty to the president and his proposals.

It should be noted that the Constitutional Court will have a lot of work justifying the constitutionality of some amendments. The problem here is not only resetting Putin's presidential terms. The problems with the constitutionality of the amendments in terms of Chapter 1 and 2 are wider and deeper. For instance, in the context of Article 3 (3), which defines only two forms of the supreme direct expression of the power of the people – referendum and free elections – the all-Russia's vote as a means of approving the constitutional amendments is problematic.

Another problem is that almost all amendments to Chapter 3 'The Federal Structure' regulate questions which are fundamental for the constitutional system (the principles of local self-government, national, cultural and demographic policy, social guarantees, the ban of same-sex marriage etc.) and can only be addressed within Chapter 1, which sets up special procedures for reviewing the Constitution. Moreover, some of the amendments are in conflict with the provisions of Chapter 1 (for instance, amended Article 79 which gives Russian law supremacy over international obligations and Article 15 which proclaims priority of international law). Considering, however, that the Constitutional Court is controlled by the President (the constitutional reform even increases this control) its decision is predictable. The Constitutional Court will confirm the constitutionality of the Bill on the constitutional amendments in general terms without providing a sound, article by article, analysis.

The positive decision of the Constitutional Court will enforce Article 2 of the Bill and trigger the all-Russia vote. This procedure is similar to a referendum. Yet, it is not a referendum, rather its imitation. The all-Russia's vote is invented to legitimize Putin's constitutional reform: on the one hand, the Kremlin needs Russia's citizens to approve the amended Constitution, on the other hand, it cannot be sure about a

positive result. The state is not ready to take a risk. The all-Russia's vote, a quasi-referendum, solves this problem.

According to Russia's Law on referenda, the decision is considered adopted, if over half of the voters who came to the polls supported it and under the condition that over half of the electorate participated in the referendum. In other words, a referendum is recognized as valid when over fifty percent of registered voters participated in it (Article 80).

The all-Russia vote simplifies the referendum procedures. First, there is no requirement of a minimum participation for the validity of the vote. According to Article 2 (25) of the Bill, the results will be determined by the number of ballots in the ballot boxes. The constitutional amendments are approved if over half of voters voted in their favour. Notably, the number of ballots issued will not be considered. Second, there is no responsibility for vote rigging and fraud. This gives a wide space for manipulations. Thus, there is no mechanism to protect the will of the people expressed by the all-Russia vote and prevent interference. Article 2 of the Bill circumvents the Law on Referenda creating an illusion of a people's vote.

Constitutional Reform, Coronavirus and Symbolism of Dates

On 10 March, after parliament decided to allow Putin to participate in the presidential elections, the Mayor of Moscow issued a decree to ban large events. This measure shall prevent the spread of the Coronavirus. At the same time, it is helpful in suppressing protests against Putin's constitutional initiatives. The ban will expire on 10 April, thus the Coronavirus will not interfere with the all-Russia vote on 22 April 2020.

22 April is not a random date. Russia's legislation on referenda and elections prescribes that the people's votes would be held on a Sunday. In this sense, the all-Russia vote is treated as an exceptional case: it is scheduled for Wednesday, which is declared as a free day. In the USSR, the 22 of April was celebrated as Lenin's birthday and the Day of the All-Union Pioneer Organisation. This date should be considered in the context of the references to the USSR, historical truth and glory of the past ('The Russian Federation is a successor of the Soviet Union...'; 'The Russian Federation united by a thousand-year history, preserves the memory of ancestors...'; 'The Russian Federation honours the memory of the defenders of the fatherland and ensure the protection of historical truth' (Art. 67 amended)). Thus, 22 April has a symbolic meaning as well as 18 March (the anniversary of Crimea's annexation) – the date when the bill on the amendments is expected to be signed by the President.